Supreme Court, U.S.
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No. 95-154

IN THE
Supreme Court of the United States
OCTOBER TERM 1995

ROSETTA MILLER, *et al.*,
Petitioners,

v.

ANGELO PEZZANI, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS BARRY H. MARGOLIS AND WORLDS OF WONDER SHARES PARTNERSHIP IN OPPOSITION

STEPHEN D. SUSMAN
SUSMAN GODFREY L.L.P.
Suite 5100
1000 Louisiana Street
Houston, Texas 77002
(713) 651-9366
Counsel for Respondents

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-981-9001

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly found on the facts before it that the outside auditors, Deloitte & Touche, rebutted scienter?

2. Whether the Ninth Circuit properly applied the principles set forth in *Virginia Bancshares v. Sandberg*, 501 U.S. 1083 (1991) in its application of the "bespeaks caution" doctrine to the facts of this case, following at least six other circuit courts and focussing on the disclosures in the particular prospectus before it?

3. Whether the Ninth Circuit properly applied the law to the particular facts before it to find that the class presented no evidence of scienter with regard to the insider trading allegations?

4. Whether the Ninth Circuit properly applied settled summary judgment precedent in rejecting speculative inferences urged by petitioners where the direct evidence rendered such inferences unreasonable?

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STATEMENT

In a carefully reasoned opinion, the Court of Appeals affirmed the District Court's summary judgment opinion as it related to Worlds of Wonder Shares Partnership, an investor, and Mr. Margolis, an outside director of Worlds of Wonder, Inc.. The factual record was correctly reviewed and summary judgment was proper as to these parties. No act or omission by them was shown in the record. Their presence in the case was an abuse of fairness, procedure, and law; they were accordingly dismissed.

The Ninth Circuit held that:

(1) The textual part of the debenture prospectus contained adequate cautionary language and was not false or misleading under the "bespeaks caution" doctrine. The Ninth Circuit further found that petitioners had failed to advance any evidence to support their claims that several sections of the prospectus were misleading.

(2) There was no evidence of scienter to support the charges of insider trading.

REASONS FOR DENYING THE PETITION

Petitioners fail to advance any special or important reason for granting their petition for a writ of certiorari.[1] Petitioners challenge the Ninth Circuit's application of the "bespeaks caution" doctrine but petitioners pointedly ignore the uniform line of court of appeals authority cited by the Ninth Circuit decision itself. The Ninth Circuit did not apply a "per se" rule. Rather, the Ninth Circuit's context-specific approach to the "bespeaks caution" doctrine was entirely consistent with *Virginia Bancshares Inc. v. Sandberg*, 501 U.S. 1083, 1097(1991) and the precedent from other circuits.[2]

Petitioners' other arguments are completely fact-bound in nature and were correctly resolved by the District

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[1] Most of the petition addresses the Ninth Circuit's holding with respect to the auditors Deloitte & Touche. Of the questions set forth above, only questions 2—4 in any way involve Mr. Margolis, and only questions 3—4 even touch upon Worlds of Wonder Shares Partnership.

[2] This issue is briefed in the opposition filed by the respondents Donald D. Kingsborough, Angelo M. Pezzani and Richard B. Stern and is incorporated herein.

Court and the Court of Appeals. Petitioners neither show nor address any evidence of wrongdoing or scienter as to Mr. Margolis or Worlds of Wonder Shares Partnership. Instead, petitioners factually mischaracterize the record, and the Ninth Circuit's holding. The Ninth Circuit found that respondents' actual trading conclusively rebutted any inference of scienter; that petitioners had no evidence to the contrary; and that petitioners could not point to any bit of supposed insider information traded upon. The Ninth Circuit's fact-bound application of settled law is not an appropriate issue for Supreme Court review.

Finally, petitioners' argument that the Ninth Circuit improperly applied controlling summary judgment standards to the facts of the case is not appropriate for review by this Court. In fact, the Ninth Circuit established no new law. Summary judgment was correctly granted, and the Ninth Circuit correctly found that petitioners could not defeat summary judgment based upon speculative inferences. These respondents rest on the record and the complete absence of any showing of wrongdoing. Review by this Court is unwarranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Stephen D. Susman
Susman Godfrey L.L.P.
Suite 5100
1000 Louisiana Street
Houston, Texas 77002
(713) 651-9366
Counsel for Respondents